Supreme Court, U.S.
FILED
JUL 13 2001
CLERK

No. 00-6933

In the
Supreme Court of the United States

REMON LEE,
Petitioner,

v.

MICHAEL KEMNA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF THE STATES OF NEBRASKA, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, GEORGIA, KANSAS, MARYLAND, MISSISSIPPI, MONTANA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioner's violation of Missouri Supreme Court Rule 24.10 is an adequate and independent state law ground to support the judgment of the Missouri Court of Appeals and bar federal habeas review of his claim.

2. If so, whether petitioner's violation of the rule can be excused by a showing of "cause" and "prejudice" or a "fundamental miscarriage of justice."

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INTEREST OF THE AMICI CURIAE

This case presents two basic questions: First, whether petitioner's violation of Missouri Supreme Court Rule 24.10 is an adequate and independent state law ground to support the judgment of the Missouri Court of Appeals. Second, if so, whether petitioner's violation can be excused. The Court's resolution of these questions could significantly affect the disposition of habeas corpus petitions in many states. Procedural rules such as Rule 24.10 are common and are necessary to effectively run the judicial process. It is important to the amici states that this Court reaffirm that state procedural rules may not be bypassed by defendants and will be respected by the federal courts. An expansion of the types of state rules deemed inadequate for procedural bar purposes would impede the justice system's interest in obtaining finality of criminal convictions and would contravene the federalism principles that underlie the adequate and independent state ground doctrine.

STATEMENT OF THE CASE

Amici adopt and incorporate the Statement of the Case set forth in the Brief for Respondent. Because petitioner Remon Lee's request for a continuance is at the heart of this case, this Statement supplements respondent's by providing additional detail regarding that application.

On Thursday, February 24, 1994, the state rested its case and Lee began putting on his defense. James McMullin, Lee's counsel, requested a hearing to make it clear that Lee was aware of his right to testify but was waiving that right. During this hearing, Lee stated that his mother, step-father and sister had come from California to testify, were present at the

courthouse at 8:30 a.m., but could not be found by 11:00 a.m. J.A. 16-18. McMullin then stated: "All I can do is proceed without them and do the best I can. Do you understand?" J.A. 18. After Lee said that he did, McMullin asked whether there was anything Lee wanted McMullin to do. Lee responded by asking whether they could obtain a short continuance and attempt to locate the missing witnesses "because it's very valuable to my case." This apparently surprised McMullin, who responded that he "suppose[d] we could ask for a capias, and—but if they're from California I don't know. Anyway— ." J.A. 18.

After Lee's testimony, the court asked McMullin whether he intended to request a continuance. McMullin stated that "[h]e's asked for one, Judge. I think I better ask for a continuance on the thing." J.A. 20. McMullin proceeded to request a continuance until the following morning. The trial judge informed the parties that he would not be available then because his daughter was going to be in the hospital. J.A. 20. After a further exchange, the trial court denied the motion for a continuance, finding that it appeared the witnesses had abandoned Lee. McMullin then suggested that the trial court continue the matter until Monday. The trial court rejected this as well, stating: "I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances. The folks were here today. They were seen here on this floor of the courthouse, and they apparently simply have abandoned . . . the defendant." J.A. 22. During the course of this hearing, neither Lee nor his attorney mentioned why the witnesses were necessary, what facts they would testify to, or the materiality of the

evidence sought to be obtained by the witnesses. Nor did they provide any explanation for the witnesses' departure. J.A. 15-25.

Following an unsuccessful motion for a new trial and application for post-conviction relief, Lee appealed to the Missouri Court of Appeals. The court stated that "the trial court could have properly denied the motion for a failure to comply with [Missouri Supreme Court] Rule 24.09," which requires that applications for continuances be made in writing. J.A. 127. The court then assumed *arguendo* that the oral motion was proper, and ruled that the trial court did not abuse its discretion by denying the continuance request because the request failed to comply with Missouri Supreme Court Rule 24.10. That rule sets forth what "[a]n application for a continuance on account of the absence of witnesses or their evidence shall show." The court found that Lee's "motion was made without the factual showing required by Rule 24.10," and that "[w]hen a denial to grant a motion for continuance is based on a deficient application, it does not constitute an abuse of discretion." J.A. 127.

Lee next filed a habeas corpus petition in the United States District Court for the Western District of Missouri. The district court rejected all seven of the claims raised by Lee. Of pertinence here, the district court concluded that Lee's due process claim based on the trial court's failure to grant a continuance was not "fairly presented" to the Missouri courts because Lee had failed to comply with Rule 24.10. J.A. 217; Pet. App. B-5.

The Eighth Circuit affirmed, holding that Lee had procedurally defaulted his claim because the Missouri Court of Appeals rested its decision on a state ground

(non-compliance with Rules 24.09 and 24.10) that was independent of the federal question and adequate to support the judgment. J.A. 234; Pet. App. A-2. The court further ruled that Lee could demonstrate neither cause and prejudice nor actual innocence to excuse his default. J.A. 234-35; Pet. App. A-2 to -3.

SUMMARY OF ARGUMENT

Missouri Supreme Court Rule 24.10 provides that an application for a continuance on account of the absence of witnesses must show (through affidavit) an array of facts regarding the need for the continuance and its likely efficacy. Missouri appellate practice provides that, if a litigant fails to comply with Rule 24.10, an appellate court will not reverse a trial court's denial of a continuance. Lee does not dispute that he failed to comply with the rule. His only contentions are that the rule is not "adequate" for procedural default purposes and, in the alternative, that his failure to comply with the rule should be excused. Neither contention has merit.[1]

I. 1. Application of the adequate and independent state ground doctrine to procedural defaults in habeas cases "recognize[s] the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). State procedural rules that serve legitimate state interests and are "firmly established and consistently applied" are "adequate" for purposes of the doctrine. This Court's few decisions

[1] Because Lee's failure to comply with Rule 24.10 suffices to bar his constitutional claims, amici do not address Lee's failure to comply with Rule 24.09.

finding state procedural rules inadequate to support procedural defaults involved extreme and unjustifiable actions by state courts that contrast sharply with what transpired here.

2. Rule 24.10 serves several legitimate state interests, most notably ensuring that the trial court obtains at the appropriate time the information it needs to rule on a continuance application. Like numerous other commonplace procedural rules, Rule 24.10 channels the presentation of an issue so that it can be resolved without disrupting (or undoing) the proceeding. That policy interest applied with full force to this case.

Had Lee complied with the rule, he would have informed the court, *inter alia*, of the purported central importance of the missing witnesses' testimony. Lee failed to do so; not until his motion for post-conviction relief did he set forth the reasons why the requested continuance was important to his case. Lee's failure to comply with Rule 24.10 placed the Missouri courts in precisely the position the rule was designed to prevent—forcing post-conviction and appellate courts to consider arguments not presented at trial and which would now greatly disrupt the judicial process if accepted.

Lee's reliance upon his counsel's opening statement is unpersuasive. He cites no Missouri rule that would permit assertions in an opening statement to substitute for the showing required (under oath) by Rule 24.10. Moreover, an opening statement is merely a map for a jury of what the potential evidence may be. That map often changes, as unexpected testimony is elicited or strategies revisited. It is not a judge's responsibility to look to that earlier map to resolve a

continuance application; it is counsel's responsibility to make his arguments and (sworn) assertions in the application.

3. Rule 24.10 is firmly established and has been regularly applied. In cases such as *State v. Boykins*, 399 S.W.2d 70 (Mo. 1966), and *State v. Cuckovich*, 485 S.W.2d 16 (Mo. 1972), the Missouri Supreme Court has held that failure to comply with the continuance rules are sufficient grounds to deny an application for a continuance. The Missouri Court of Appeals has adhered to that ruling on numerous occasions, even in cases (such as Lee's) where counsel had little notice of witnesses' absence.

It matters not that the Missouri Court of Appeals has several times affirmed trial court denials of continuances on the merits, even though the defendants had violated Rule 24.10. Such holdings were perfectly consistent with the rule, for no continuances were ordered. In any event, a procedural rule does not become "inadequate" merely because it is applied with some minor inconsistencies.

II. Lee cannot show cause to excuse his default. The only "cause" proffered by Lee is the sudden disappearance of his witnesses. That disappearance does not explain, let alone justify, his failure to apprise the trial court of the information mandated by Rule 24.10, such as the materiality of witnesses' expected testimony.

Nor is Lee justified in invoking the "fundamental miscarriage of justice" exception to the procedural bar rule. That exception is limited to cases where probable innocence can be shown. Even if the missing witnesses had testified in the manner Lee now suggests, their

testimony would have conflicted with that of four witnesses at trial. Thus, the jury would have been faced with a credibility issue. This is hardly the "rare" or "extraordinary situation," *Schlup v. Delo*, 513 U.S. 298, 321 (1995), that justifies application of the exception.

ARGUMENT

I. Lee's Violation of Missouri Supreme Court Rule 24.10 is an Adequate and Independent State Ground to Support the Missouri Court of Appeals' Judgment

A. Application of the Adequate and Independent State Ground Doctrine to Federal Habeas Furthers Significant Practical and Federalism Interests

1. The "adequate and independent state ground" doctrine dates back to "the time of [the Court's] foundation," *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945), and was reaffirmed in *Murdock v. City of Memphis*, 87 U.S. 590, 632-633 (1874), where the Court stated that it should not "examine and decide other questions not of a Federal character." If the state law bases for a lower court decision "are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question," the Court would not be justified in reviewing the matter. *Id.* at 635. By the turn of the century, the "adequate and independent state ground" concept was fully ingrained in the Court's jurisprudence. *See Fox Films Corp. v. Muller*, 296 U.S. 207, 210 (1935).

This Court has long applied the doctrine to "state decisions forfeiting federal claims for violation of state procedural rules." *Harris v. Reed*, 489 U.S. 255, 261

(1989) (quoting Daniel Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1134 (1986)). After some fits and starts, the Court made clear in *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), that this application of the doctrine applies in federal habeas. *Sykes* and later cases, culminating in *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), confirmed that "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."

The notion that constitutional rights can be forfeited in criminal cases "by the failure to make timely assertion of the right" is neither novel nor unfair. *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Criminal trials can proceed in an orderly manner only if rules of procedure are imposed and firmly enforced. *Taylor v. Illinois*, 484 U.S. 400, 411 (1988). For this reason, the federal criminal justice system and all state criminal justice systems penalize those who sleep on their rights. Modern habeas corpus law merely applies that bedrock principle by respecting the penalties imposed by state courts. And it does so in a forgiving way, by excusing petitioners' defaults if they can show cause and prejudice or actual innocence.

Any other rule would contravene "considerations of comity and federalism." *Coleman*, 501 U.S. at 746 (quoting *Francis v. Henderson*, 425 U.S. 536, 541-42

(1976)). Giving "greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants . . . would reflect an anomalous and erroneous view of federal-state relations." *Id.* By contrast, application of the adequate and independent state ground doctrine to procedural defaults in habeas cases "recognize[s] the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Id.* at 750.

2. Notwithstanding the important state interests served by the federal courts' deference to the states' procedural rules, not every such rule is an "adequate" one that can support a procedural default. Although this Court has not enunciated a definitive definition of the term "adequate" in this context, it has described the types of rules that are not adequate. A state procedural rule which, on its face or as applied, is "an arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958), and does not serve "a legitimate state interest," *Henry v. Mississippi*, 379 U.S. 443, 448-449 (1965), is not adequate. The Court held that the Kentucky Supreme Court ran afoul of this principle when the latter ruled that a defendant lost the right to obtain a particular jury instruction because his counsel requested an "admonition" from the judge, rather than an "instruction." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

In *James*, the Court also held that a state procedural rule that is not "firmly established and regularly followed" is not adequate. *Id.* Applying that standard in *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991), the Court held that the Georgia Supreme Court's retroactive application of a rule requiring

Batson claims to be made prior to the time jurors are sworn was not an adequate procedural bar. At the time of petitioner Ford's trial, it was permissible for a defendant to raise a *Batson* claim after the jury had been sworn. The rule applied by the Georgia Supreme Court—which was created two years after Ford's trial— was obviously not "firmly established" at the time of that trial. *Id.*

Lee does not dispute that Missouri Supreme Court Rule 24.10 is independent of federal law. Thus, the issue before the Court is whether or not that rule provides an adequate state ground to support the judgment. For the reasons set forth below, this Court should conclude that it does. The Missouri Court of Appeals' application of Rule 24.10 is utterly unlike the application of procedural rules in *James* and *Ford*. To the contrary, the Missouri court acted sensibly and in accordance with longstanding state practice.

B. Rule 24.10 Serves Significant Public Purposes Generally and as Applied in this Case

Missouri Supreme Court Rule 24.10 provides that an application for a continuance on account of the absence of witnesses must set forth: (1) the facts showing the materiality of the evidence sought to be obtained; (2) due diligence on the part of the applicant to obtain the witnesses and the testimony; (3) the name and residence of the absent witnesses, if known; (4) facts showing reasonable grounds for belief that the attendance or testimony of the witnesses will be procured within a reasonable time; (5) the particular facts "the affiant" expects the witnesses will prove, and that such facts cannot be proven through other witnesses or evidence; (6) that the applicant is not

responsible for the witnesses' absence; (7) and that the application is made in good faith.

The core of Lee's argument is that, in his "unusual situation," it was senseless to apply Rule 24.10 strictly. *See* Pet. Br. 19, 34-41. The opposite is true. The laudable public policy objectives of the rule were fully applicable to Lee's situation. By failing to comply with the rule, Lee withheld from the trial court the arguments he later made to other tribunals in support of his continuance application. It is commonplace for claims to be forfeited because they (or facts supporting them) are made at the wrong time. Nothing more occurred here.

1. Rule 24.10, far from being an "arid ritual," serves numerous state interests. The rule ensures that the trial court obtains at the appropriate time the information it needs to rule on the continuance request; provides guidance to litigants; standardizes practice across the state; mandates preparation by the parties; provides reliability through the affidavit requirement; and allocates the burden of proof.

The first listed purpose is perhaps the most significant. Rule 24.10 gives a trial court the ability to issue a timely and correct ruling on the motion by requiring the moving party to set out the critical facts and asserted need for a continuance. As noted by Professor Meltzer, rules such as Rule 24.10 serve the

> promotion of focused consideration of particular questions at different times, when the pertinent evidence and argumentation can be mustered; and the avoidance of wasteful proceedings by requiring prompt consideration of issues upon whose resolution further

> matters (or the continuation of the proceeding at all) depend. It is hard to imagine an effective procedural system lacking such rules of the road.

Daniel J. Meltzer, *supra*, 99 Harv. L. Rev. at 1134-35. Rule 24.10 sets forth a blueprint for trial courts that clarifies the showing that must be made at the critical moment in the proceedings.

Rule 24.10 also serves the interests of the parties, by guiding counsel as to the required contents of a continuance application and sparing the court the need "to instruct the applicant on how he may obtain a continuance." *State v. McGinnis*, 622 S.W.2d 416, 420 (Mo. Ct. App. 1981). The proponent does not have to hazard a guess whether his request will at least merit consideration on its merits by the court. Moreover, the proponent will know where to file the application, when he has to file, and what he has to file. And since the procedural rule is applicable statewide, a party can walk into a courtroom in any city or town in Missouri and know what is expected.

Rule 24.10 also forces parties to prepare and be prepared. It establishes that a party is not entitled to an automatic continuance because of a missing witness or misplaced evidence. The rule thereby prevents abuse by parties who did not prepare their case or are not practicing due diligence in preparing the case. *State v. Boykins*, 399 S.W.2d 70, 73-74 (Mo. 1966). Finally, through its affidavit requirement and placement of burden of proof on the movant, Rule 24.10 imposes duties on the movant that increase reliability and reduce unnecessary delays of trials.

2. This type of procedural rule is commonplace and vital to all states. As the Court has said, "[e]ach State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984). "Procedural rules establishing the time and manner for asserting rights in state courts are familiar" and "serve critical purposes." Meltzer, *supra*, 99 Harv. L. Rev. at 1134.

Even if we focus strictly on rules governing continuances, we see that Missouri's approach is run-of-the-mill. A majority of the states in the Eighth Circuit alone have rules on continuances that are similar to Missouri's. Moreover, several supreme courts of those states have held, as Missouri's has, that if a proponent of a motion to continue fails to comply with the procedural rules the trial court may overrule the application for the continuance. *See* Ark. Code Ann. §16-63-402 (Michie 1987); Ark. R. Crim. P. 27.3; *Wilson v. State*, 895 S.W.2d 524, 526 (Ark. 1995); Iowa R. Civ. P. 183(b); *State v. Ware*, 338 N.W.2d 707, 714 (Iowa 1983) (Rule 183 applies to criminal cases); Minn. Stat. Ann. § 631.02 (West Supp. 2001); Neb. Rev. Stat. Ann. §§ 25-1148, 29-1206 (Michie 1995); N.D. Cent. Code §§ 29-19-06, 29-19-08 (1991); *State v. Letcher*, 552 N.W.2d 402, 407 (S.D. 1996).

3. Lee does not dispute that he failed to meet many of the requirements of Rule 24.10. Instead, the thrust of Lee's argument is that (1) Rule 24.10 was not adequate "as applied to Lee's unusual situation, where an oral motion for continuance was necessitated by the sudden and unexpected disappearance of Lee's witnesses" (Pet. Br. 19), and (2) the materiality of the

alibi testimony was "obvious and unquestioned" (Pet. Br. 37). Neither contention has merit. The Missouri Court of Appeals was entirely justified in dismissing Lee's appeal based on his failure to comply with the requirements of Rule 24.10.

The public policies served by Rule 24.10—in particular, ensuring that the court is provided with the information it needs to make a reasoned decision—applied with full force here. Had Lee complied with Rule 24.10 (to the extent it can be complied with orally), he would have informed the court (through his counsel's argument and/or his own testimony) that his motion should be granted because of the central importance of the witnesses' testimony to the case. He would have stated that the witnesses were expected to place Lee in California when the murder was committed, which would contradict the testimony of several of the states' key witnesses. Had the trial court heard that argument, with facts supporting it, it may have granted the motion. But when Lee failed to proffer any reason to delay the trial on account of the missing witnesses—stating only that "it's valuable to my case" (J.A. 18)—the court took the only sensible course based on the information then available to it: denying the motion.

The opening statement of Lee's counsel cannot substitute for argument in a motion for a continuance (or oral argument supporting an oral motion). Lee cites no Missouri law that would allow the piggybacking of statements made in one part of a trial onto a separate, distinct hearing. Moreover, one purpose of Rule 24.10 is to force a proponent to declare, under penalty of perjury, that he believes the motion to be true. By contrast, an opening statement is not subject to a

challenge or punishment. Opening statements merely provide a map or guide for the trier of fact of the evidence counsel expects to present. During a trial, however, the theory of the case may change and the "map" may need to be updated or thrown out completely.

Lee's own actions during the trial and in post-trial papers suggest that is precisely what happened. Were the missing witnesses truly central to Lee's case, one would have expected Lee to have said so when seeking the continuance. At the very least, one would have expected Lee to have said so in later proceedings before the trial court. Yet only when Lee filed his application for post-conviction relief did he attempt to explain to a court the purported importance of obtaining the continuance. J.A. 56-59.

Given Lee's own delay in raising the alleged centrality of the missing witnesses, it is hard to find fault with the trial court for failing to detect that alleged centrality on its own. But even if we assumed for the sake of argument that the trial court easily could have seen the alleged importance of the missing witnesses, that does not excuse Lee's failure to comply with Rule 24.10. In many cases, literally thousands of bits of information pass before the eyes and ears of a judge on a daily basis. Without the focus brought upon by strict adherence to the rules, a trial court is forced to wander throughout the deep depths of an entire trial to pinpoint one moment in time where the proponent of the motion may have referred to the reason he wanted a particular witness to testify.

With these rules, the focus of the requesting party is clear and a trial judge can make an informed and educated judgment on whether the proponent met his

burden without having to guess the exact reason for the request. After all, the burden to demonstrate the need for a continuance is not on a judge; it is on the proponent of the continuance. Rule 24.10 is in place to aid the judge in determining if the missing evidence or testimony is material. Lee paid the long-standing, commonplace price for non-compliance with the rule.

C. Rule 24.10 is Firmly Established and Has Been Regularly Followed

1. Rule 24.10 was adopted by order of the Missouri Supreme Court in 1979 and has existed in some form for more than a century. The present rule derives from Mo. Rev. Stat. §545.720 (2000), which can be traced back to the Missouri Revised Statutes of 1889 and possibly earlier. *See* Mo. Rev. Stat. §4181 (1889) (precursor to §545.720).

The Missouri courts have regularly applied Rule 24.10 to affirm the denial of a continuance. For example, in *State v. Boykins*, *supra*, the Missouri Supreme Court found that the defendant had not met the requirements of former Missouri Supreme Court Rule 25.08 (a precursor to Rule 24.10). The court held that "[u]nder the applicable rule the trial court had no alternative but to overrule the application." 399 S.W.2d at 74. And in *State v. Cuckovich*, 485 S.W.2d 16 (Mo. 1972), the Missouri Supreme Court recognized that failure to comply with former Rule 25.08 was, by itself, sufficient grounds for denying the motion for a continuance. In *Cuckovich*, a witness was allegedly unavailable due to an illness. Finding that the continuance application did not comport with the rule, the court affirmed the trial court's exercise of its discretion to overrule the motion. *Id.* at 21-22.

Following the Missouri Supreme Court's lead, the Missouri Court of Appeals has held, time after time, that when a continuance request based on absent witnesses failed to conform to Rule 24.10, the trial court did not abuse its discretion by denying the motion. *See, e.g., State v. Collie*, 503 S.W.2d 445, 446-47 (Mo. Ct. App. 1973); *State v. Martin*, 515 S.W.2d 802, 804 (Mo. Ct. App. 1974); *State v. Paige*, 550 S.W.2d 582, 583-84 (Mo. Ct. App. 1977); *State v. Henderson*, 568 S.W.2d 556, 558 (Mo. Ct. App. 1978); *McGinnis*, 622 S.W.2d at 420; *State v. Green*, 647 S.W.2d 902, 903-04 (Mo. Ct. App. 1983); *State v. Freeman*, 702 S.W.2d 869, 874 (Mo. Ct. App. 1986); *State v. Morin*, 873 S.W.2d 858, 871 (Mo. Ct. App. 1994). This longstanding practice has obtained even in cases where, as here, witnesses unexpectedly were not available for trial. *See* Resp. Br. at 26-27 (citing cases).

Missouri law is clear that, once an appellate court concludes that a procedural violation has occurred, it need not look any further and can uphold the trial court's denial of a continuance application even if the trial court did not rely on that violation. *See State v. Jack*, 813 S.W.2d 57, 60 (Mo. Ct. App. 1991). All litigants in Missouri know or should know about the need to comply with Rule 24.10. In contrast to *Ford v. Georgia*, all parties are "deemed to have been apprised of" Rule 24.10, which was published and interpreted by the Missouri appellate courts long before Lee's trial.

2. Lee nevertheless argues that Rule 24.10 is not "adequate" because (1) Missouri courts have often denied continuance requests on their merits notwithstanding violations of the rule, and (2) the rule "describes the actual substantive showing required to obtain a continuance." Pet. Br. 32-33. As to the former

argument, Lee's premise does not support his conclusion. Missouri appellate practice provides that if a litigant fails to comply with Rule 24.10, an appellate court will not *reverse* a trial court's denial of a continuance. Appellate decisions *affirming* trial court denials of continuances is not inconsistent with that rule. Lee points to no Missouri appellate cases in which trial court denials of continuances were reversed even though the litigant had failed to comply with Rule 24.10.

Moreover, the very basis of the *Harris v. Reed*, *supra*, "plain statement" rule is that state courts can foreclose federal habeas review by (plainly) relying on a state procedural bar while reaching the merits of a federal claim as an alternative holding. Stated the Court: "By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." 489 U.S. at 264 n.10.

Concomitantly, a state procedural rule does not become "inadequate" merely because the state courts on occasion move past the procedural default and reject a claim on its merits. *See Dugger v. Adams*, 489 U.S. 401, 410-11 n.6 (1989) (finding Florida procedural rule adequate even though the Florida Supreme Court "has addressed the merits in several cases" where the rule had been violated). Thus, Rule 24.10 is not rendered inadequate merely because the Missouri state courts have sometimes affirmed on the merits trial court denials of continuance applications that had failed to conform with Rule 24.10.

Lee's second argument—that Rule 24.10 "describes the actual substantive showing required to obtain a

continuance"—is equally unavailing. The rule on its face sets forth what a continuance application "shall show." The rule does not provide, or even infer, that once a movant makes that showing the trial court must grant a continuance. It could not be otherwise. A trial court can readily conclude that a continuance should not be granted even where a litigant has set forth the purportedly material facts to which a missing witness would attest (as well as the other information required by Rule 24.10). As this Court has recognized, "[t]rial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Morris v. Slappy*, 461 U.S. 1, 11 (1983).

II. Lee Cannot Demonstrate Cause and Prejudice or a "Fundamental Miscarriage of Justice" to Excuse His Procedural Default

1. A procedural default can be excused if a person can demonstrate good cause for not following the state procedural rule and was prejudiced from the rule's application. *See Sykes*, 433 U.S. at 87. Even were we to assume that Lee could show prejudice, he cannot show cause.

The "cause" upon which Lee relies is the "sudden disappearance of [his] alibi witnesses." Pet. Br. 42. But that utterly fails to explain why Lee, in his application for a continuance, failed to state why the witnesses were necessary, the facts to which they would testify, or the materiality of that expected testimony. The disappearance of the witnesses set the stage for the continuance request; it did not "cause" his failure to comply with state-law requirements of such a request.

Likewise, whether or not a court officer "induced the witnesses to leave" (Pet. Br. 42) is besides the point. It does not bear on why Lee failed to put forth facts and arguments in his request to the trial court for a continuance. In the end, Lee does not truly assert "cause"; he simply reiterates his arguments as to why his non-compliance with Rule 24.10 should not justify a procedural default in the first instance.

The only conceivable "cause" for Lee's default was the arguably poor performance of his counsel. *Cf. Murray v. Carrier*, 477 U.S. 478, 492 (1986) (setting forth standards for when counsel's performance can serve as "cause"). The Eighth Circuit, however, found that Lee had not properly presented his ineffective-assistance claim to the state courts (J.A. 235; Pet. App. A-3), and Lee has not advanced that argument to this Court.

2. A procedural default can also be excused in order to prevent a "fundamental miscarriage of justice." *See Coleman*, 501 U.S. at 750. The Court has limited this escape valve to cases where it is more likely than not that no reasonable juror would have convicted the habeas petitioner in light of the new evidence of innocence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of judicial resources with the individual interest in justice that arises in the extraordinary case. *Id.* at 324. To ensure that the fundamental miscarriage of justice exception would remain "rare" and would only be applied in the "extraordinary case," while at the same time ensuring that it would extend relief to those who were truly deserving, the Court explicitly tied it to the petitioner's innocence. *Id.* at 321.

Lee's case does not present the "rare" or "extraordinary" situation contemplated by *Schlup*. Two eyewitnesses placed Lee in the getaway car (J.A. 124-25); two additional witnesses testified that they saw Lee with the other culprit in Missouri the night before the murder (T.Tr. 450-53, 471-74)—all of which directly contradicts the testimony Lee's missing witnesses purportedly would have made. Hence, the "evidence" Lee wanted to introduce would have presented the jury with a routine credibility question. This is not a case where DNA evidence has demonstrated a defendant's innocence or even where a key witness has recanted his testimony. The fundamental miscarriage of justice exception would be a gaping loophole to the procedural default rule if it applied in such an ordinary case.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted.

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July 2001